

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MATTHEW M. KOZLOWSKI,)	No. C 08-00954 JW (PR)
)	
Plaintiff,)	ORDER OF SERVICE; DIRECTING
)	DEFENDANTS TO FILE
vs.)	DISPOSITIVE MOTION OR NOTICE
)	REGARDING SUCH MOTION;
CHARLES D. LEE, et al.,)	INSTRUCTIONS TO CLERK
)	
Defendants.)	
)	
_____)	

Plaintiff, a California prisoner, filed a pro se civil rights action under 42 U.S.C. § 1983 against medical personnel at Salinas Valley State Prison (“SVSP”). Plaintiff’s motion for leave to proceed in forma pauperis, (Docket No. 4), will be granted in a separate order. The Court now reviews the complaint pursuant to 28 U.S.C. § 1915A(a).

DISCUSSION

A. Standard of Review

Federal courts must engage in a preliminary screening of cases in which prisoners seek redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint “is

frivolous, malicious, or fails to state a claim upon which relief may be granted,” or “seeks monetary relief from a defendant who is immune from such relief.” Id. § 1915A(b). Pro se pleadings must be liberally construed, however. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

B. Legal Claims

Plaintiff alleges that defendants Charles D. Lee and Robert Bowman are in charge of medical care at SVSP, and in that capacity treated him medically from June 16, 2005 to November 1, 2005. Plaintiff alleges that defendants were aware that he was diagnosed with ostiomyolites [sic] in his calf and that other doctors had recommended that he receive antibiotic treatment. Plaintiff alleges that he was not given treatment until five and a half months later, by which time the infection had soaked in so deep that surgery was necessary. Plaintiff states that “the doctor who did the surgery said he cut out as much bone as he could without amputating [plaintiff’s] leg” but that he “might have to have it amputated in the future.” (Compl. 3.) Plaintiff alleges defendants’ failure to provide treatment constitutes deliberate indifference to his serious medical needs in violation of his Eighth Amendment right against cruel and unusual punishment. Liberally construed, plaintiff’s claim is cognizable under § 1983.

CONCLUSION

1. The clerk of the Court shall issue summons and the United States Marshal shall serve, without prepayment of fees, a copy of the complaint in this matter, all attachments thereto, and a copy of this order upon **Charles D. Lee** and **Robert Bowman** at the **Salinas Valley State Prison**. The clerk shall also mail

1 courtesy copies of the complaint and this order to the California Attorney General's
2 Office.

3 2. No later than **ninety (90) days** from the date of this order, defendants
4 shall file a motion for summary judgment or other dispositive motion with respect to
5 the claims in the amended complaint found to be cognizable above.

6 a. If defendants elect to file a motion to dismiss on the grounds
7 plaintiff failed to exhaust his available administrative remedies as required by 42
8 U.S.C. § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion
9 pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied
10 Alameida v. Terhune, 540 U.S. 810 (2003).

11 b. Any motion for summary judgment shall be supported by
12 adequate factual documentation and shall conform in all respects to Rule 56 of the
13 Federal Rules of Civil Procedure. **Defendants are advised that summary**
14 **judgment cannot be granted, nor qualified immunity found, if material facts**
15 **are in dispute. If any defendant is of the opinion that this case cannot be**
16 **resolved by summary judgment, he shall so inform the Court prior to the date**
17 **the summary judgment motion is due.**

18 3. Plaintiff's opposition to the dispositive motion shall be filed with the
19 Court and served on defendants no later than **forty-five (45) days** from the date
20 defendants' motion is filed.

21 a. In the event the defendants file an unenumerated motion to
22 dismiss under Rule 12(b), plaintiff is hereby cautioned as follows:¹

23 The defendants have made a motion to dismiss pursuant to Rule
24 12(b) of the Federal Rules of Civil Procedure, on the ground
25 you have not exhausted your administrative remedies. The
26 motion will, if granted, result in the dismissal of your case.
When a party you are suing makes a motion to dismiss for
failure to exhaust, and that motion is properly supported by

27 ¹ The following notice is adapted from the summary judgment notice to be
28 given to pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th
Cir. 1998) (en banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 declarations (or other sworn testimony) and/or documents, you
2 may not simply rely on what your complaint says. Instead, you
3 must set out specific facts in declarations, depositions, answers
4 to interrogatories, or documents, that contradict the facts shown
5 in the defendant's declarations and documents and show that
6 you have in fact exhausted your claims. If you do not submit
7 your own evidence in opposition, the motion to dismiss, if
8 appropriate, may be granted and the case dismissed.

9
10 b. In the event defendants file a motion for summary judgment,
11 the Ninth Circuit has held that the following notice should be given to plaintiffs:
12

13 The defendants have made a motion for summary judgment by
14 which they seek to have your case dismissed. A motion for
15 summary judgment under Rule 56 of the Federal Rules of Civil
16 Procedure will, if granted, end your case.

17 Rule 56 tells you what you must do in order to oppose a motion
18 for summary judgment. Generally, summary judgment must be
19 granted when there is no genuine issue of material fact--that is,
20 if there is no real dispute about any fact that would affect the
21 result of your case, the party who asked for summary judgment
22 is entitled to judgment as a matter of law, which will end your
23 case. When a party you are suing makes a motion for summary
24 judgment that is properly supported by declarations (or other
25 sworn testimony), you cannot simply rely on what your
26 complaint says. Instead, you must set out specific facts in
27 declarations, depositions, answers to interrogatories, or
28 authenticated documents, as provided in Rule 56(e), that
contradict the facts shown in the defendants' declarations and
documents and show that there is a genuine issue of material
fact for trial. If you do not submit your own evidence in
opposition, summary judgment, if appropriate, may be entered
against you. If summary judgment is granted in favor of
defendants, your case will be dismissed and there will be no
trial.

19 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is
20 advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v.
21 Catrete, 477 U.S. 317 (1986) (holding party opposing summary judgment must come
22 forward with evidence showing triable issues of material fact on every essential
23 element of his claim). Plaintiff is cautioned that failure to file an opposition to
24 defendants' motion for summary judgment may be deemed to be a consent by
25 plaintiff to the granting of the motion, and granting of judgment against plaintiff
26 without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per
27 curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

1 4. Defendants shall file a reply brief no later than **fifteen (15) days** after
2 plaintiff's opposition is filed.

3 5. The motion shall be deemed submitted as of the date the reply brief is
4 due. No hearing will be held on the motion unless the Court so orders at a later date.

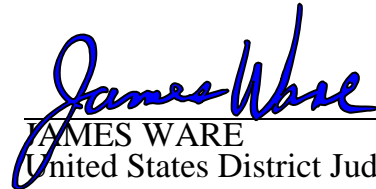
5 6. All communications by the plaintiff with the Court must be served on
6 defendants, or defendants' counsel once counsel has been designated, by mailing a
7 true copy of the document to defendants or defendants' counsel.

8 7. Discovery may be taken in accordance with the Federal Rules of Civil
9 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or
10 Local Rule 16-1 is required before the parties may conduct discovery.

11 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must
12 keep the court informed of any change of address and must comply with the court's
13 orders in a timely fashion. Failure to do so may result in the dismissal of this action
14 for failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

15 9. Extensions of time must be filed no later than the deadline sought to be
16 extended and must be accompanied by a showing of good cause.

17
18 DATED: August 5, 2008



JAMES WARE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

MATTHEW M KOZLOWSKI,
Plaintiff,

Case Number: CV08-00954 JW

CERTIFICATE OF SERVICE

v.

CHARLES D LEE, et al,
Defendants.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on August 6, 2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Matthew M. Kozlowski P 82055
Mule Creek State Prison
P. O. Box 409020
Ione, Ca 95640-900

Dated: August 6, 2008

Richard W. Wieking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk